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No. 58

In the Supreme Court of the United States

OCTOBER TERM, 1962

RUDOLPH LOMBARD, ET AL.,
PETITIONERS

v.

STATE OF LOUISIANA,
RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

Brief on behalf of the State of Louisiana

JACK P. F. GREMILLION
Attorney General
State Capitol
Baton Rouge, La.
MICHAEL E. CULLIGAN
Assistant Attorney General
104 Supreme Court Bldg.
New Orleans, La.
WM. P. SCHULER
Assistant Attorney General
104 Supreme Court Bldg.
New Orleans, La.
JIM GARRISON
District Attorney
2700 Tulane Ave.
New Orleans, La.
FRANK J. SHEA
Executive Assistant District Attorney
2700 Tulane Ave.
New Orleans, La.
LOUISE KORNS
Assistant District Attorney
2700 Tulane Ave.
New Orleans, La.

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May it Please the Court:

STATEMENT OF THE CASE

The facts surrounding the sit-in demonstration which is the basis of the criminal mischief charge brought against these defendants by the State of Louisiana are given in detail in the opinion of the Supreme Court of Louisiana in this case, *State v. Goldfinch*, 241 La. 958, 132 So.2d 860 (1961).

Between ten and eleven o'clock on the morning of September 17, 1960, two Negro men, a Negro woman, and a white man—the four defendants in this proceeding[1]—took seats at a 24-stool lunch counter re-

[1] Rudolph Joseph Lombard, a student at Xavier University; Cecil Winston Carter, a student at Dillard University; Sydney Langston Goldfinch, Jr., a student at Tulane University; and Oretha Maureen Castle, a student at Southern University—all located in New Orleans.

served for white customers[1] in one of McCrory's Five and Ten Cent Stores, located at 1005 Canal Street in New Orleans. R. 103-105.

McCrory's is one of a national chain of stores operating in 34 states, McCrory Stores, Inc. R. 19, 119. It sells a variety of merchandise and is open to the general public. R. 19. The question of whether the lunch counter facilities in the various McCrory stores are segregated or integrated is left by the national office of McCrory Stores, Inc., to be determined by local tradition, law and custom, as interpreted by the manager of each individual store. R. 21.

The McCrory's store in which these defendants staged their sit-in demonstration had had separate counters for serving food to Negro and white customers since 1938, R. 110. There is no Louisiana law nor New Orleans ordinance requiring segregation in public eating places, and by operating separate lunch counters for whites and Negroes McCrory's was simply following local custom.

An employee of the lunch counter at which defendants sat down called the restaurant manager, who informed the students that he could not serve them there, that he had to sell to them at the rear of the store where he had a colored counter. R. 104-105. When the manager received no answer from the sit-ins he turned off the lights, removed the unoccupied stools and closed the counter. R. 105, 133-135. A sign read-

[1] There are five eating places in the store: a main restaurant that seats 210; a counter for Negroes that seats 53; a white refreshment bar that seats 24; and two stand-up counters. R. 104.

ing "this counter is closed" was pointed out to the students but they remained seated, in silence. R. 105. The restaurant manager then called the store manager and the police. R.105-107. Prior to the arrival of the police the store manager went behind the counter at which defendants were sitting and asked them to leave, but they neither answered him nor moved. R.113.

When the police arrived the store manager advised the students, in the presence of the police, that the counter at which they were sitting was closed, and asked them to leave the store. R.122, 126-127. Nothing happened. Thereupon the police officers ordered defendants to move, and when they failed to do so, arrested them and charged them with criminal mischief. R.129, 6; R.S. 14:59.

Pertinently, under paragraph (6) of Article 59 of the Louisiana Criminal Code, R.S. 14:59 (6), criminal mischief is the intentional performance of the following act: "Taking temporary possession of any part or parts of a place of business, or remaining in a place of business after the person in charge of such business or portion of such business has ordered such person to leave the premises and to desist from the temporary possession of any part or parts of such business."

Defendants were tried and found guilty of criminal mischief. R. 139. The Louisiana Supreme Court affirmed their convictions. *State v. Goldfinch*, 241 La. 958, 132 So.2d 860. They applied to this Honorable Court for a writ of certiorari, which was granted on June 25, 1962. 370 U.S. 935.

ARGUMENT

I

The Fourteenth Amendment to the Constitution of the United States applies only to state action.

The first section of the Fourteenth Amendment to the United States Constitution provides pertinently that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law: nor deny to any person within its jurisdiction the equal protection of the laws."

In order to enforce by appropriate legislation what it thought to be the provisions of the Fourteenth Amendment, Congress passed the Civil Rights Act of 1875, prohibiting, among other things, certain private racially discriminatory action.[1] In the famous *Civil Rights Cases*, 109 U.S. 3, however, the sections of the act dealing with discriminatory action by the proprietors of inns, theaters, etc., were held by this Court to be unauthorized by the Fourteenth Amendment (and

[1] 18 Stat. 335, the first section of which provided "That all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude." Section 2 stated that anyone who violated Section 1 would have to pay the person aggrieved $500 and could be convicted of a misdemeanor.

also by the Thirteenth) and hence to be unconstitutional and void. The various civil rights cases before the Court involved indictments of persons who had denied to Negroes the accommodations of a hotel, a theater, and a railroad car. In discussing the scope of the first section of the Fourteenth Amendment in the *Civil Rights Cases* this Court relied on three of its earlier decisions dealing with this amendment (*United States v. Cruikshank*, 92 U.S. 542; *Virginia v. Rives*, 100 U.S. 313; *Ex Parte Virginia*, 100 U.S. 339) and said:

> "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. . . . It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. . . . to provide

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[1] After the federal Civil Rights Act was held unconstitutional by this Court in the *Civil Rights Cases* many of the states passed civil rights acts by virtue of their police power, as did Congress for the District of Columbia. See *District of Columbia v. Thompson*, 346 U. S. 100; *Fletcher v. Coney Island*, 136 N.E. 2d 344 (Ohio App. 1955); Emerson and Haber, Political and Civil Rights in the United States, v. 2, p. 1406 (2d ed. 1958).

modes of redress against the operation of State laws, and the action of State officers executive or judicial, when these are subversive of the fundamental rights specified in the amendment. Positive rights and privileges are undoubtedly secured by the Fourteenth Amendment; but they are secured by way of prohibition against State laws and State proceedings affecting those rights and privileges. . . ."

Further on in the *Civil Rights* opinion this Court repeated its conclusion that only the positive acts of a state were the subject matter of the Fourteenth Amendment, saying:

". . . until some State law has been passed, or some State action, through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment . . . can be called into activity; for the prohibitions of the amendment are against State laws and acts done under State authority."

And in the more recent case of *Shelley v. Kraemer*, 334 U.S. 1, Mr. Chief Justice Vinson said for the Court:

"Since the decision of this Court in the *Civil Rights Cases*, 109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."

It is submitted that this Court's interpretation

of the first section of the Fourteenth Amendment as being a limitation on state action only is eminently correct. The phrasing of this part of the amendment ("No State shall make or enforce any law . . .; nor shall any State deprive any person . . .; nor deny to any person . . .") allows no other interpretation.

Under the above jurisprudence it is clear that the defendants in the instant case, denied equal eating privileges with white customers, could have looked to the Fourteenth Amendment for help in having their convictions for criminal mischief set aside only had state action brought about the denial.

There being no Louisiana law nor New Orleans ordinance requiring segregation of the races in restaurants, it is evident that there are only two possible sources for the requisite state action in the sit-in demonstration which formed the basis of this prosecution: either 1) the action of McCrory's itself in discriminating against the defendants on the basis of race, or 2) the action of the New Orleans Police and of the state courts in arresting and criminally prosecuting the defendants for criminal mischief when they refused to leave McCrory's at the request of the local manager.

It is the position of the State of Louisiana in this proceeding that neither the action of McCrory's nor the action of the city police and state courts was state action within the meaning of the Fourteenth Amendment and that hence the amendment is not applicable here.

II

The Concept of State Action

Ministerial acts of the state judiciary and acts of the state executive and legislature are state acts for the purposes of the Fourteenth Amendment, *Ex parte Virginia*, 100 U.S. 339; *Strauder v. West Virginia*, 100 U.S. 303. This is also true of the acts of state boards, *Raymond v. Chicago Union Traction Co.*, 207 U.S. 20; of municipalities, *Home Telephone & Telegraph Co. v. Los Angeles*, 227 U.S. 278; of state courts construing state law, *Twining v. New Jersey*, 211 U.S. 78; and of public facilities, *Mayor and City Council of Baltimore City v. Dawson*, 350 U.S. 877 (public beaches maintained by public authorities of state and city); *Holmes v. City of Atlanta*, 350 U.S. 879 (golf courses provided and maintained by city); *New Orleans City Park Improvement Ass'n. v. Detiege*, 358 U.S. 54 (city park).

For a general discussion of this subject, see Lewis, The Meaning of State Action, 60 Col. L. Rev. 1083 (1960); Schwelb, The Sit-in Demonstration: Criminal Trespass or Constitutional Right?, 36 N.Y.U.L. Rev. 779 (1961); Van Alstyne and Karst, State Action, 14 Stanford L. Rev. 3 (1961); Abernathy, Expansion of the State Action Concept Under the Fourteenth Amendment, 43 Cornell L.Q. 375 (1958); Pollitt, Dime Store Demonstrations: Events and Legal Problems of First Sixty Days, 1960 Duke L.J. 315, 350; Wollett, Race Relations, 21 La. L. Rev. 85 (1960); Dennis, State Involvement in Private Discrimination Under the Fourteenth Amendment, 21 La. L. Rev. 433 (1961); Losos, The Impact of the Fourteenth Amendment on Private Law, 6 St. Louis U.L.J. 368 (1961).

Also found to be state acts are those of state officials, even when the official's act not only is not a part of his statutory duty, but is prohibited by state law. *Screws v. United States*, 325 U.S. 91. Furthermore, the state's lessee acts for the state in operating a public facility such as a municipal swimming pool, *Lawrence v. Hancock*, 76 F. Supp. 1004 (D.C. W. Va. 1948), and also in operating a private business such as a restaurant, *Burton v. Wilmington Pkg. Auth.* 365 U.S. 715.

The action of some private organizations has been held to be state action if the private organization performs a governmental function, conducts the public's business under a franchise, or is financed and controlled by the state or by one of its subdivisions. Thus a private political organization controlling the state election procedure has been treated as a state agency for purposes of the Fourteenth Amendment. *Nixon v. Herndon*, 273 U.S. 536; *Nixon v. Condon*, 286 U.S. 73; *Smith v. Allwright*, 321 U.S. 649; *Terry v. Adams*, 345 U.S. 461. The action of the directors of a testamentary trust administered by the City of Philadelphia was found to be state action. *Pennsylvania v. Board of Trusts*, 353 U.S. 230. Similarly, the acts of a privately endowed and operated library which received substantial financial and administrative aid from the city in which it was located have been characterized as state action. *Kerr v. Enoch Pratt Free Library of Baltimore City*, 149 F. 2d 212 (4 cir. 1945). And the acts of a public utility operating for the

benefit of the public pursuant to a franchise issued to it by the city are the acts of the state and not those of an ordinary business corporation. *Boman v. Birmingham Transit Company*, 280 F. 2d 531 (5 cir. 1960).

Two cases in this area of state action deserve special comment: *Marsh v. Alabama*, 326 U.S. 501, and *Shelley v. Kraemer*, 334 U.S. 1.

In *Marsh v. Alabama*, decided in 1946, a Jehovah's Witness was arrested under an Alabama trespass law for distributing religious literature on the streets of a company-owned town. The town, a suburb of Mobile known as Chickasaw, was owned by the Gulf Shipbuilding Corporation; otherwise it had all of the characteristics of any other American town—residential buildings, streets, a system of sewers, a shopping center, a post office. The Jehovah's Witness was convicted of trespass by the Alabama courts because she entered and remained on the company's property after having been warned by the company not to do so. Relying on the First and Fourteenth Amendments to the United States Constitution she appealed to this Court, which set aside her conviction on the ground that no town, even a privately owned one, could by ordinance, or as here by company rule, bar the distribution of religious or political literature on its streets, sidewalks or public places, or make the right to distribute that literature dependent upon the whim of an official. The people who lived in or came to Chicasaw, this Court said, could not be denied freedom of press and of reli-

gion simply because a single company had legal title to all of the town. The owner of the town was classified with the owners of privately held bridges, ferries, turnpikes and railroads, which cannot be operated as freely as a farmer does his farm. "Since these facilities are built and operated primarily to benefit the public", this Court said, "and since their operation is essentially a public function, it is subject to state regulation." In other words, because the company-owned town functioned just like any other municipality, this Court treated it as a municipality, and in effect held its action to be state action.

In *Shelley v. Kraemer*, decided two years later in 1948, this Court held that the enforcement by a Missouri court of a restrictive covenant, having as its purpose the exclusion of Negroes from the ownership or occupancy of real property throughout an entire neighborhood in St. Louis, was state action which violated the Fourteenth Amendment. In 1911 thirty out of a total of thirty-nine owners of property in that city fronting both sides of one street had signed an agreement barring sale of any property within the above boundaries to Negroes for a period of fifty years. The entire district described in the agreement included fifty-seven parcels of land, of which the thirty owners who signed the agreement owned forty-seven parcels. In 1945 the owner of one of the parcels of land included in the agreement nevertheless sold his property to a Negro, Shelley, and owners of other parcels subject to the restrictive agreement sued to set aside the

sale to Shelley. Shelley defended on the ground that judicial enforcement of the agreement, barring sale to him because of his race, violated rights guaranteed to him by the Fourteenth Amendment. The Supreme Court of Missouri upheld the agreement, thus denying title to Shelley.

This Court granted certiorari and set aside the judgment of the Missouri Supreme Court on the ground that the action of the Missouri court in enforcing the terms of the restrictive covenant was state action prohibited by the Fourteenth Amendment. Among the civil rights protected from discriminatory state action by that amendment, this Court pointed out its opinion in *Shelley*, is the right to acquire and dispose of property, specifically reserved to every American citizen by section 1978 of the Revised Statutes, 42 U.S.C. 1982, and therefore no state nor municipality can by statute or ordinance prevent Negroes, *qua* Negroes, from buying property in a specified locality. See *Buchanan v. Warley*, 245 U.S. 60. As long as the refusal to sell property to Negroes was based on the voluntary choice of the St. Louis property owners, the *Shelley* opinion continued, no state action, and hence no violation of the Fourteenth Amendment, was involved, but when one of the property owners who signed the restrictive agreement changed his mind and sold his land to a Negro, the subsequent setting aside of the sale by the Missouri court was state action which deprived both the vendor and the vendee of the right to buy and sell property without regard to race, contrary to the Fourteenth Amendment.

III

McCrory's Action Was Not State Action

1. *The action of McCrory's in the instant case in refusing to serve these defendants at its white lunch counter was private action, not state action.*

No argument is needed to show that McCrory's Five and Ten Cents Store is not an official, an agency, a subdivision, a lessee, a board, or a public facility* of the State of Louisiana. McCrory's store, where the sit-in demonstration by these defendants took place, is a segment of a large private enterprise devoted to the purpose of making money for its owners. This private organization performs no governmental function such as that performed by a private political organization which controls the state election procedure (see *Nixon v. Condon*, etc., supra); it is not financed or administered, even partially, by either the City of New Orleans or the State of Louisiana (see *Kerr v. Enoch Pratt Free Library*, supra): and it does not have a franchise to operate in New Orleans for the benefit of the public (see *Boman v. Birmingham Transit Company*, supra).

2. *Marsh v. Alabama*

Nor is this Court's decision in *Marsh v. Alabama*,

*The State of Louisiana takes issue with the view expressed by Mr. Justice Douglas in his concurring opinion in *Garner v. Louisiana*, 368 U.S. 157, 176, that those who run a retail establishment in Louisiana operate a public facility because they are required by the State Sanitary Code, promulgated by the Louisiana Board of Health under R.S. 40:1-11, to obtain a public health permit from the Board of Health if they sell food. See infra.

326 U.S. 501, helpful to these defendants. It is true that the owners of McCrory's, for their own advantage (like the owner of Chickasaw), opened their property up to the public in general, but no more so than do most other private retail businesses in this country. The crux of this Court's decision in *Marsh* is that the company town involved there was exactly like any other town in the United States, and was for this reason limited by the provisions of the Fourteenth Amendment in regard to freedom of expression on its streets—just like any other town. In the instant case McCrory's is a privately owned store, and its owners have the same rights as those enjoyed by any other private shopkeeper in America in the absence of a state civil rights act[1]—*i.e.*, the right to refuse to serve any customer at any time for any reason, however arbitrary that reason might be. *Terminal Taxicab Co. v. Dist. of Col.*, 241 U.S. 252.

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[1]Although the Louisiana Constitution of 1868, generally referred to as the Carpet Bag Constitution (*Saint v. Allen*, 169 La. 1046, 126 So. 548) provided in Art. 13 that all persons should enjoy equal rights and privileges in all public conveyances and places of a public character, without discrimination on account of race or color (see *Joseph v. Bidwell*, 28 La. Ann. 382), this provision was omitted in the later Louisiana Constitutions of 1879, 1898, 1913 and 1921. Furthermore, Sections 458, 1699 and 1700 of the Louisiana Revised Statutes of 1870—the civil rights laws implementing the 1868 constitutional provision—lay dormant for decades and were officially repealed in 1954. See R.S. 4:3, 4. Therefore Louisiana is presently one of the approximately 25 states in this country which do not have a civil rights act. For the states which do have public accommodations statutes, see Greenberg, Race Relations and American Law, p. 375 (1959).

3. *A business open to the public is not ipso facto the state.*

As this Court pointed out in *Terminal Taxicab Co. v. Dist. of Col.*, supra, it is true that all business, and for that matter every life in all of its details, has a public aspect, some bearing upon the welfare of the community in which it is passed. The mere fact that a business has a public aspect, however, does not mean that it is indistinguishable from the holder of a franchise and that it therefore acts for the state.

A state grants to a private corporation an exclusive right or franchise to perform a public utility service such as furnishing gas, electricity, transportation, etc., to the inhabitants of a city because the grantee is performing the public's business, doing something which the state deems to be required for the public necessity or convenience. See *Boman v. Birmingham Transit Company*, 280 F2d 531. It is logical, therefore, to say that the holder of a franchise acts for the state, because in fact it does. However, the majority of businesses in this country act not for the state, nor for the public, but for their private owners. It is true that since the decisions of this Court in *Munn v. Illinois* 94 U.S. 113, and *Nebbia v. New York*, 291 U.S. 502, the state has the right to regulate all business for the public good, and not just those businesses which are public utilities or have a franchise from the state, and does not by this regulation offend the due process clause of the Fourteenth Amendment sought to be used as a shield by business—but this is a far cry from saying that private business open to the pub-

lic in order to make a profit for its owners is indistinguishable from a public utility for the purposes of discriminatory state action under the equal protection clause of the Fourteenth Amendment.

4. *Defendants are not being deprived of any legal or constitutional right.*

Another feature distinguishing the instant case from *Marsh* is that in *Marsh* the accused was deprived of her right to freedom of expression, whereas in the instant matter the defendants were not deprived of any legal or constitutional right at all. Nothing in the Federal Constitution guarantees to the citizen of a state the inalienable right to be served in any store or restaurant he might choose to enter. Further, McCrory's lunch counter is not within the scope of Sec. 216 (d) of Part II of the Interstate Commerce Act, 49 U.S.C. Sec. 316 (d), see *Boynton v. Virginia*, 364 U.S. 454, nor of any other similar federal act as far as we have been able to discover. Nor, as we have pointed out previously, does Louisiana have a civil rights act.

Although at common law innkeepers and public conveyances had a duty to serve all who applied to them, see 10 Am. Jur. 909, storekeepers did not. *Terminal Taxicab Co. v. Dist. of Col.*, supra. In about one-half of the states in this country at the present time a citizen has the right to be served at any lunch counter at which he might sit, regardless of his color, religion or race, but this is solely because these states have under their police power passed a civil rights act, or

some type of public accommodations law. See Greenberg, Race Relations and American Law, p. 375-379 (1959); Emerson and Haber, Political and Civil Rights in the United States, v. 2, p. 1405-1422 (2d ed. 1958).

The basis of this Court's decisions in *Boynton v. Commonwealth of Virginia*, 364 U.S. 454, and *Burton v. Wilmington Parking Authority*, 365 U.S. 715—both involving Negroes attempting to be served in restaurants catering exclusively to whites—is not that the customer in either case had a constitutional right to be served, but rather 1) that in *Boynton* the Negro customer had a federal right to be in the bus terminal restaurant because of the Interstate Commerce Act, which in Sec. 216 (d) of Part II forbids any interstate common carrier by motor vehicle to subject any person to unjust discrimination, and 2) that in *Burton* the restaurant owner, as the state's lessee, had to comply with the proscriptions of the Fourteenth Amendment.

Inasmuch as McCrory's is not a lessee of the state, as its lunch counter is not regulated by Sec. 216 (d) of Part II of the Interstate Commerce Act, and as Louisiana has no civil rights act, what enforceable right did these defendants have to demand to be served at that lunch counter in McCrory's store?

5. *Freedom of expression*

Furthermore, if defendants' action in remaining silently seated at the lunch counter, after being asked by the store manager to leave the counter and the store, R. 113, 122-127, is viewed as a form of expres-

sion condemning segregated lunch counters, similar to picketing, defendants nevertheless had no right under the First Amendment to remain seated on McCrory's stools after being told that they would not be served at that counter, thus keeping other customers away by illegally occupying McCrory's property, as in a sit-down strike.

Although the First Amendment to the United States Constitution protects freedom of expression in all of its many forms, the method of expression must be a legal one. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490. In *Labor Board v. Fansteel Corp.*, 306 U.S. 240, this Court held that seizure of Fansteel's two key buildings by striking workers* to prevent their use by the employer in a lawful manner and to compel the employer by force to submit to their demands was an illegal act on the part of the workers and as such punishable by loss of the right to job reinstatement after the strike ended. The opinion in *Fansteel* reveals that the sit-down strikers were forcibly removed from the buildings by the sheriff and his men and that they were subsequently fined and imprisoned for refusing to leave the building. The First Amendment protects peaceful picketing, *American Federation of Labor v. Swing*, 312 U.S. 321, but not seizure of the offending party's property.

In the instant case defendants could have pro-

*Who apparently entered the buildings with the permission of the owner, but stayed on as strikers after stopping work.

tested McCrory's segregated lunch counters by parading the sidewalk in front of the store carrying signs stating their objections. *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552. By taking possession of a portion of McCrory's lunch counter, however, and by refusing to leave the counter and the store when asked to do so by the management, they violated Louisiana's criminal mischief statute, Article 59, paragraph 6, of the Louisiana Criminal Code, R.S. 14:59 (6), and put themselves beyond the protection of the First Amendment.

In *Martin v. Struthers*, 319 U.S. 141, in striking down as a denial of the First Amendment right to freedom of speech a municipal ordinance forbidding the ringing of doorbells, etc., for the purpose of distributing handbills, this Court concluded that it should be left to each householder to decide whether he would receive such callers, and that a city could validly punish those who insisted on calling at a home in defiance of the previously expressed wish of the occupant not to be disturbed.

If a state can punish persons who summon a homeowner against his wishes in order to hand him religious literature, and not thereby violate the First Amendment guarantee of freedom of speech, it follows logically that a state can punish persons who stage a sit-in demonstration at a private lunch counter against the express wishes of the management without depriving those persons of any rights under the First Amendment.

6. *Garner v. Louisiana*

Under the reasoning of the concurring opinion of Mr. Justice Douglas in *Garner v. Louisiana*, 368 U.S. 157, 176, McCrory's action in refusing to serve these defendants because three of them were Negroes was not state action.

The *Garner* case is similar to the instant one in that it involved sit-in demonstrations at lunch counters in retail establishments similar to McCrory's.[9]

I

Action of a private individual which is motivated by the custom of a locality is not state action under the decision of this Court in the Civil Rights Cases.

It is true that this Court in its majority opinion in the *Civil Rights Cases* said:

". . . civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, *unsupported by State authority in the shape of* laws, *customs*, or judicial or executive proceedings." (Emphasis added)

The word "custom" has several meanings,[10] one

[9]The two pertinent sit-ins in *Garner* took place at Kress' Department Store and Sitman's Drug Store in Baton Rouge, Louisiana.

[10]See Webster's Third New International Dictionary (1961). Article 3 of the Louisiana Civil Code states that customs result from a long series of actions constantly repeated which have acquired the force of a tacit and common consent. They are useful in construing contracts, especially ambiguous ones. See Art. 1953, La. Civ. Code.

of them being synonymous with law because in various places and at various times, especially in societies in the early stages of civilization, custom has been enforced by the state as law. This was particularly true, for example, in France and England. See Allen, Law in the Making, esp. Ch. I, Custom: Nature and Origin, and Ch. II, Custom: Interpretation and Application (6th ed. 1958); Pound, Jurisprudence, v. III, Ch. 16, Sources and Forms of Law (1959); Rodenbeck, Anatomy of the Law, p. 3 (1925) ("There are certain customs and usages according to which human relations are regulated which are not, necessarily, law. The humblest village custom, however, may be a law if enforced by the sovereign."); Pollock, First Book of Jurisprudence, Part II, Ch. IV, Custom in English Law (5th ed. 1923) ("Custom, as understood in law, is usage which hath obtained the force of law, and is in truth a binding law for the particular place, persons and things concerned." p. 281); Edmunds, Law and Civilization, Ch. 17, Nature and Sources of the Common Law (1959)

In Sir Frederick Pollock's *Jurisprudence and Legal Essays* (Goodhart ed., 1961) the following appears under the heading "The Nature and Meaning of Law" on pages 4-5:

"There has been much discussion about the relation of custom to law. Custom, except in distinctly technical applications which are really part of a developed legal system, seems to have no primary meaning beyond that of a rule or habit of action which is in fact used or observed . . . by some body or class

of persons, or even by one person. It was the 'custom' of Hamlet's father to sleep in his orchard of the afternoon. In the *Morte d'Arthur* we constantly read of a 'custom' peculiar to this or that knight; for example, Sir Dinadan had such a custom that he loved every good knight, and Sir Galahalt, 'the hault prince', had a custom that he would eat no fish . . . . No constant relation to law or judicial authority can be predicated of custom. It may or may not be treated as part of the law. Much law purports to be founded upon custom, and much custom has certainly become law."

The word "customs" as used by this Court in the *Civil Rights Cases* is obviously synonymous with laws, unwritten laws enforced by state courts like the common law. This Court could not have meant in that opinion that private individuals cannot discriminate against each other on the basis of race because of habit or usage, as that is just what the innkeeper, theater owner and railroad proprietor in the *Civil Rights Cases* were doing. Those owners of private businesses in the *Civil Rights Cases* refused to serve Negro customers who applied to them only because of custom, used in its nonlegal sense, just as McCrory's did in the instant matter. If this Court had been of the opinion in 1883 that individual action based on personal habit or community usage is state action, then it would have held the Civil Rights Act of 1875 to be constitutional, on the ground that it was aimed at state action and so authorized by the Fourteenth Amendment.

Baldwin v. Morgan, 287 F.2d 750 (5 cir. 1961), cited in Mr. Justice Douglas' concurring opinion in *Garner*, is an apt illustration of an instance in which state policy may be expressed in custom in a manner reprehensible to the Fourteenth Amendment, but that case is easily distinguishable from the one presently before this Court. In *Baldwin*, the segregation of races was enforced in the Railroad Terminal Station at Brimingham at the instigation of the Alabama Public Service Commission. In other words, an agency of the state was enforcing a policy of segregation in a terminal owned by several railroads, similar to, if not identical with, a public utility. The crucial difference between *Baldwin* and the instant case is that in *Baldwin* the state itself was doing the segregating on the basis of custom, on what amounted to state property, whereas in the proceeding presently before this Court the manager of a private business was doing the segregating, on the basis of custom, on private property. In the *Baldwin* case the state through the public service commission and the owners of the terminal could not segregate on the basis of race for *any* reason—law, custom or whim—whereas in the instant case the private owner could segregate on the basis of race for *any* reason personal to himself, including voluntary adherence to custom.

If the action of any private citizen acting in voluntary accordance with local custom *ipso facto* becomes state action, why has it been necessary for approximately one-half of our states, not to mention the Dis-

trict of Columbia, to enact civil rights acts to protect their citizens from discrimination based on race or religion in public places? See *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28; *District of Columbia v. Thompson Co.*, 346 U.S. 100. All discrimination of this kind is based on custom of either an individual, a class, or a locality.

Therefore, it is only when a custom of racial segregation is enforced by a state court as state law, or when a state agency itself discriminates on the basis of custom, as in *Baldwin v. Morgan*, supra, that state action proscribed by the Fourteenth Amendment is expressed in custom. The discrimination of a private person, even though it is motivated solely by custom and the desire to conform or to make money, is private action and so is outside of the scope of that amendment.

II

A lunch counter in a retail establishment is not a public facility.

In part II of his concurring opinion in *Garner* Mr. Justice Douglas reasons that "Those who run a retail establishment under permit from a municipality operate, in my view, a public facility in which there can be no more discrimination based on race than is constitutionally permissible in the more customary types of public facility." 368 U.S. 182-183.

It is conceded that under Louisiana law restaurants are a form of private property which affect the public health and hence are subject to regulation by

the state under its police power. It is well settled that this regulation does not violate the due process clause of the Fourteenth Amendment. *Nebbia v. New York* 291 U.S. 502.

Under the provisions of Art. 7.02 of the Sanitary Code promulgated by the State Board of Health, see R.S. 40:11, no person shall operate a public eating place of any kind in the State of Louisiana unless he has been issued a permit to operate by the health officer, and permits shall be issued only to persons whose establishments comply with the requirements of the Sanitary Code. Under Article 7.017 of that Code the term "health officer" means the health officer of a municipality, parish or health district.

Section 4-1202 (2) of the Home Rule Charter of the City of New Orleans provides that the Department of Health of the city shall enforce the State Sanitary Code. Section 29-56 of the Code of the City of New Orleans specifies that it shall be unlawful for any person to engage in the sale of foodstuffs within the city without having previously obtained a permit to conduct such business from the Department of Health (C.C.S., Ord. 2570, Sec. 2.) For this permit there is no charge.

As we have said, the action of a private corporation operating under an exclusive franchise from the state has been held to be state action for the purposes of the equal protection clause of the Fourteenth Amendment. *Boman v. Birmingham Transit Company*, 280 F. 2d 531. This is a logical classification, as a

franchise is an exclusive right granted by the state to a private corporation to carry on business of a public nature, such as the operation of a public utility, generally on public property. It is a right granted by the state to an individual or corporation to do something which the corporation or individual otherwise could not do, such as the right to use a street for a trolley track, or to erect on it poles for telephone or electric wires, or to use the area under the street for water or gas pipes. 23 Am. Jur. 713-746, Franchises.

On the other hand a permit, license or certificate issued by a state board of health or by a state board of barbers, dentists, medical examiners, etc., is simply a regulatory device by means of which the state government polices private businesses and professions in the state for the public good.

As was pointed out earlier herein, the mere fact that a state has the right under its police power to regulate all business for the public good, and not solely those businesses which are public utilities or have a franchise from the state, and does not by this regulation offend the due process clause of the Fourteenth Amendment, does not mean that *any* business open to the public which happens to be regulated by the state through the state board of health, etc., is indistinguishable from a public utility for the purposes of discriminatory state action under the equal protection clause of the Fourteenth Amendment.

The theory that the holder of a license or permit to operate from the state is a public facility and hence

acts for the state was rejected by implication by this Court in the *Civil Rights Cases*. This is one of the strong arguments advanced by Mr. Justice Harlan in his dissent in that case. 109 U.S. 26, 41-43. There Mr. Justice Harlan argued that the owners of a place of amusement, inn, etc., exercised a "quasi public employment" within the meaning of the Civil Rights Act of 1875 because they "are established and maintained under direct license of the law. The authority to establish and maintain them comes from the public. The colored race is a part of that public. The local government granting the license represents them as well as all other races within its jurisdiction. A license from the public to establish a place of public amusement, imports, in law, equality of right, at such places, among all the members of that public." For a state to issue a license to a place of amusement which discriminated against colored people was, Mr. Justice Harlan reasoned, a violation of the Thirteenth Amendment by the state.

Under the doctrine announced in *Munn v. Illinois*, he continued, places of public amusement conducted under the authority of the law are clothed with a public interest because used in a manner to make them of public consequence and to affect the community at large. "I am of the opinion," he stated, "that such discrimination practiced by corporations and individuals in the exercise of their public or quasi-public functions is a badge of servitude the imposition of which Congress may prevent under its power, by ap-

propriate legislation, to enforce the Thirteenth Amendment; and consequently, without reference to its enlarged power under the Fourteenth Amendment, the act of March 1, 1875, is not, in my judgment, repugnant to the Constitution." Dissenting opinion of Mr. Justice Harlan, *Civil Rights Cases*, 109, U.S. at page 43.

By refusing to adopt the argument of Mr. Justice Harlan in the *Civil Rights Cases* this Court rejected the reasoning advanced by Mr. Justice Douglas in his concurring opinion in *Garner—i.e.*, that the private owner of a business open to the public, such as a place of amusement or a restaurant, who is required by a state to obtain a regulatory permit, violates the Fourteenth Amendment (and/or the Thirteenth Amendment) by discriminating against a would-be customer because of his race.

In the City of New Orleans, not only are all establishments selling food required to obtain a permit from the City Department of Health, see Art. IV of Ch. 29, Health and Sanitation, Code of the City of New Orleans, p. 363-365; but barbers must have a certificate of registration, R.S. 37:360; dentists must have a license, R.S. 37:762; registered nurses must have a license, R.S. 37:920; optometrists must have a certificate, R.S. 37:1052; physicians and surgeons must have a certificate, R.S. 37:1273—to mention only a very few of the many regulated businesses and professions.

If a restaurant is a segment of the state govern-

ment, or acts for the state, simply because it is open to the public and must obtain a permit from the local board of health, so, by the same reasoning, are all of the holders of permits, licenses, certificates, etc., who do business with the public. Under such an approach this country would have a national civil rights act far broader than that ever dreamed of by the Congress of 1875.

IV

The action of the New Orleans Police and of the State Courts in arresting and convicting defendants is not prohibited state action under the Fourteenth Amendment.

If in the instant case, to pose a hypothetical situation, the manager of McCrory's and other managers of New Orleans five and ten cent stores had mutually contracted among themselves to refuse to serve Negroes at integrated lunch counters; if, further, one of the managers had changed his store's policy and had opened his lunch counters to white and Negro alike on an equal basis; and, if, in the event of the foregoing, the Louisiana courts had allowed the store managers standing by their contract to recover damages from their more liberal confrere or to enjoin his integrating acts, then we would have state action in violation of the Fourteenth Amendment under the holding of *Shelley v. Kraemer*, 334 U.S. 1, because it would be the state discriminating and not the individual of his own free will.

Or if, to pose another hypothetical situation,

the manager of McCrory's on September 17, 1960—the date of the sit-in demonstration which gave rise to these proceedings, R. 103—had happened to be an ardent civil rights advocate who cared more about his principles than his profits, and he had told his employees to serve these defendants instead of asking them to leave the counter and the store, R. 113, 122, 126-127, but irate white customers had called the New Orleans Police, causing the arrest and conviction of defendants, for, say, disturbing the peace—here again we would have state action reprehensible to the Fourteenth Amendment because the store manager wanted to serve Negroes at his lunch counter alongside whites, but was prevented from doing so by the state.

But if the manager of McCrory's had the right to refuse to serve these defendants at one of his lunch counters, which we maintain he did, and if, as happened, they refused to leave the lunch counter after he had told them that he would not serve them there and had asked them to leave the counter and the store, R. 113-127—in this situation, which is the one which actually occurred, defendants' arrest by the New Orleans Police and conviction by the Louisiana courts for criminal mischief under Article 59 of the Louisiana Criminal Code, R.S. 14:59, cannot be held to be state action which offends the Fourteenth Amendment.

The state court in the present case is not enforcing a state law, written or unwritten, discriminating against Negroes, but rather is upholding the legal right of a private lunch counter owner to serve whom

he pleases. And if the lunch counter owner has the right not to serve a customer because of that customer's race or religion—which right he does have in the absence of a state civil rights act—then he has the incidental right to remove the would-be customer from his premises without undue force. See *Maronne v. Washington Jockey Club*, 227 U.S. 633. Unless the lunch counter owner also has the right to call the police to remove the offender for him, society is going to be faced with the problem of self-help in this area.

The actions of state police officers which have been found by this Court to be expressive of state policy violative of the Fourteenth Amendment have occurred when those police officers on their own initiative and acting on their own impulses have deprived a person in their custody of a federal right. In *Screws v. United States*, 325 U.S. 91, Sheriff Screws, a policeman and a deputy arrested Hall for theft, handcuffed him, and took him to the court house, where the three police officers beat him to death for alleged resistance and insulting language. See also *Catlette v. United States*, 132 F. 2d 902 (4 cir. 1943), in which a deputy sheriff compelled his prisoners to drink large quantities of castor oil, tied them with rope and forced them to march through the streets, and *United States v. Classic*, 313 U.S. 299, in which election officials who conducted a primary election willfully altered and falsely counted and certified the ballots. In *Monroe v. Pape*, 365 U.S. 167, Chicago police officers broke

into a Negro family's home without a search warrant and submitted the family to various indignities. In the instant case, defendants are not contending that they were in any way mistreated by the New Orleans Police after their arrest.

This Court has also found reprehensible to the Fourteenth Amendment judicial action which systematically excluded persons of Mexican descent from juries, *Hernandez v. Texas*, 347 U.S. 475; or denied the accused due process of law, *Powell v. Alabama*, 287 U.S. 45; or enforced state common law policy which deprived a citizen of a right guaranteed to him by the federal constitution, such as freedom of expression by peaceful picketing which is protected by the First Amendment, *American Federation of Labor v. Swing*, 312 U. S. 321, or the right to contract under 42 U.S.C., Sec. 1982, *Shelley v. Kraemer*, 334 U.S. 1.

The instant case, however, falls into none of the above categories. The Louisiana courts have enforced no state law depriving these defendants of a federal right. Their freedom of expression could not be exercised by their illegally seizing possession of McCrory's lunch counter stools, see *Labor Board v. Fansteel Corp.*, 306 U.S. 240, and the freedom to contract protected by 42 U.S.C. Sec. 1982[11] is only the freedom to be allowed to carry out a contract already entered

[11]42 U.S.C. Sec. 1982 provides that all citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to purchase, lease, sell, etc., real and personal property.

into with a willing seller, or the freedom to enter into a contract with a willing seller, see *Shelley v. Kraemer*, 334 U.S. 1, free from interference by state laws or courts. Under 42 U.S.C. Sec. 1982 there inheres in every citizen the right to make a contract concerning property with another willing party, but a contract by its very name implies two or more willing parties. There is no unilateral right of contract for any citizen in this country, white or black.

The decision of this Court in *Shelley* does not prevent the state from aiding private persons to implement their racial or religious prejudices if this prejudice is expressed in a legal manner; that is, if in aiding the private person who is discriminating the state is not infringing on a federal right of the person discriminated against—the right to life, freedom of speech, contract, due process, etc.

Would a private homeowner be prevented by the *Shelley* decision from calling the police and asking for their help and that of the state courts to keep a Catholic from coming into his house, or to eject one therefrom, the only motivation of the homeowner being that he just hated all Catholics? The answer is no, because the Catholic has no federal right to enter the home of another without the consent of its owner, whereas the homeowner does have the right to receive on his property only those whom he wants, and this even though the state itself could in no way discriminate against that Catholic simply because of his religion, and even though that homeowner could not by

restrictive covenant prevent his next door neighbor from filling his house with Catholics if he so desired.

Therefore, we come again to the pivotal point of this case before this Court. If McCrory's had the right to refuse to serve defendants at its white lunch counter and the right to have its request to defendants to leave the store complied with by them—and it is the State of Louisiana's position that McCrory's had these rights —then the action of the New Orleans Police and of the Louisiana courts in arresting and convicting these defendants is not state action prohibited by the Fourteenth Amendment.

CONCLUSION

We believe that in arguing our case we have touched on most of the issues raised by defendants before this Court. We will now deal briefly with the issues which we have not yet discussed. See their Petition for Certiorari, p. 2-3, Questions Presented.

1. *Defendants were not convicted on a record barren of any evidence of guilt.*

Defendants were charged with criminal mischief, R.S. 14:59 (6), which is the intentional taking of temporary possession of any part of a place of business, or the intentional remaining in a place of business after the person in charge of the business has ordered the possessor to leave the premises and to desist from the temporary possession of the part.

The record in this case shows that defendants sat down at a lunch counter in McCrory's and remained there after the store manager had told them that he would not serve them and had asked them to leave the counter and the store. R. 122, 126, 127, 135.

2. *Defendants were not convicted under a penal provision which was so indefinite and vague as to afford no ascertainable standard of criminality.*

No criminal statute could be more specific and definite than R.S. 14:59 (6).

3. *Defendants were not arrested and convicted to enforce Louisiana's racial discrimination policy.*

Defendants were arrested and convicted because they insisted on remaining at a lunch counter at which

McCrory's wished to serve only white persons, probably because McCrory's manager thought that he could make more money that way than by operating an integrated lunch counter.

4. *The due process clause of the Fourteenth Amendment, which incorporates the free expression guarantee of the First Amendment, does not extend to illegal forms of expression.*

This question has already been fully discussed in our brief.

5. *The trial judge did not err in refusing to allow defendants the right to introduce evidence showing that the store owners were acting in concert with municipal and state law enforcement officers.*

McCrory's manager testified that he set the eating policy for his store—whether segregated or integrated—on the basis of local tradition and custom, as interpreted by him. R. 21, 22. Defendants made no attempt at the trial of this case to show that the manager's decision to keep his lunch counters segregated resulted from intimidation or bribery by city or state officials.

If McCrory's had the right to discriminate against defendants on the basis of race, it had the right to call law enforcement officers for help in getting defendants out of its store, and its manager had the right to meet with members of the New Orleans Police Department to discuss problems of sit-in demonstrations and how they should be handled if they occurred in his store. R. 23. The fact that the manager might

have had his plan for dealing with possible sit-ins approved in advance by the New Orleans Police, or that he might have adopted a plan suggested to him by the Police, would only show that he was a far-sighted, efficient, law-abiding manager. The natural thing for a businessman in his position to do would be to consult the local police about his rights in the matter.

As for the possibility that McCrory's manager might have discussed the sit-in situation with the managers of other department stores in New Orleans: under the decision of this Court in *Shelley v. Kraemer*, 334 U.S. 1, he not only had the right to discuss the situation with the other managers, but also had the right to enter into a restrictive agreement with them to keep all lunch counters in all department stores in the city segregated. Of course this agreement could not have been enforced by the Louisiana courts, but it could have been voluntarily adhered to by the managers. Restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed by the Fourteenth Amendment. "So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the state and the provisions of the Amendment have not been violated." *Shelley v. Kraemer*, supra. Therefore, defendants would have gained nothing by showing that such an agreement existed, if in fact it did. R. 96.

Let us suppose that Shelley, of *Shelley v. Kraemer* fame, had wanted to buy Kraemer's house, but

that the latter had refused to sell. If Shelley had nevertheless forced his way into Kraemer's house and had refused to leave until he received title to the place, certainly Kraemer could have called the police to oust Shelley, and the validity of Kraemer's action would not have been affected by the fact that he had discussed the possibility of such an invasion beforehand with his fellow homeowners and with the police, and that he acted in accordance with those discussions in ousting Shelley.

The only relevant evidence which defendants could have introduced in this area would have been evidence tending to show that state or city officials had forced McCrory's to maintain segregated lunch counters against its owners' will, by threatening reprisals in the event that the store's lunch counters were integrated by the local manager.

The fact that Louisiana state policy favors segregation of the races, R. 110, is immaterial in the instant case unless the state or city government compelled the manager of McCrory's to maintain segregated lunch counters. Only if McCrory's was forced by state or city officials to follow, against its will, a local custom of segregation would the Fourteenth Amendment come into play. Significantly, at no time during the trial of this case did defendants try to introduce evidence to establish this type of coercion. All that defendants tried to show during the trial, and claim now that they were injured by not being allowed to show, was

concert, or cooperation, between the manager of McCrory's, other department store managers, and the New Orleans Police. We submit that the trial judge was correct in excluding as irrelevant this type of evidence.

Therefore, even if we should view this allegation of error in the trial court in the light most favorable to defendants and should concede that if they had been permitted to do so by the trial judge they would have shown that the store owners were acting in concert with municipal and state law enforcement officers, such a showing would not add anything to their case.

6. *Hearsay evidence was not used to furnish one of the necessary elements in defendants' crime, or, if it was so used it was admissible as part of the res gestae under Louisiana law.*

Under Article 447 of the Louisiana Code of Criminal Procedure, R.S. 15:447, whatever forms any part of the res gestae is always admissible in evidence.

In *State v. Di Vincenti*, 232 La. 13, 93 So.2d 676, the Louisiana Supreme Court said that in this state the term res gestae is given a very broad interpretation "to include testimony, offered at the trial, of witnesses and police officers as to what they had heard or observed before, during, or after the commis-

Agreement in a design or plan; union formed by mutual communication of opinions and views; accordance in a scheme. Webster's Third New International Dictionary (1961)

sion of the crime, or immediately before or after the crime if causally related thereto."

7. *The Supreme Court of Louisiana found nothing objectionable in the questions asked of state witnesses in this case by the trial judge.*

See *State v. Goldfinch*, 241 La. 958, 132 So.2d 860—the case presently before this Court as it was reported below.

It is respectfully submitted that this Honorable Court does not have jurisdiction in this case because neither state action nor denial of due process under the Fourteenth Amendment to the United States Constitution is here involved; that the writ in this case should therefore be declared to have been improvidently granted; and that the judgment of the Supreme Court of Louisiana should be affirmed.

JACK P. F. GREMILLION
Attorney General
State Capitol
Baton Rouge, La.

MICHAEL E. CULLIGAN
Assistant Attorney General
104 Supreme Court Bldg.
New Orleans, La.

WM. P. SCHULER
Assistant Attorney General
104 Supreme Court Bldg.
New Orleans, La.

JIM GARRISON
District Attorney
2700 Tulane Ave.
New Orleans, La.

FRANK J. SHEA
Executive Assistant District Attorney
2700 Tulane Ave.
New Orleans, La.

LOUISE KORNS
Assistant District Attorney
2700 Tulane Ave.
New Orleans, La.

CERTIFICATE OF SERVICE

I, William P. Schuler, Assistant Attorney General of the State of Louisiana, a member of the Bar of the Supreme Court of the United States, hereby certify that a copy of the above and foregoing Brief on behalf of the State of Louisiana to the Supreme Court of Louisiana has been deposited in the United States mail, postage prepaid, addressed to the attorneys for the petitioners, namely, Carl Rachlin, 280 Broadway, New York 7, New York, John P. Nelson, 535 Gravier Street, New Orleans, Louisiana, and Lolis E. Elie, 2211 Dryades Street, New Orleans, Louisiana.

WILLIAM P. SCHULER

October ....., 1962, New Orleans, Louisiana